IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. .....

JOSEPH M. KAISER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals (R. 96) has not yet been reported.

II.

Jurisdiction.

1. The indictment is for violation of the Harrison Narcotic Act (26 U. S. C. A. 2554 (a)).

2. The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

III.

Statement of the Case.

Although a "summary statement of the matter involved" is contained in the foregoing petition, yet for more completely informing the court, and that we may fully comply with the rules, we here give a short *statement of the facts*, with appropriate references to the pages of the record.

(May 27, 1942) Hollenbeck (the government's decoy) phoned petitioner from the Narcotic Office and said, "I would like to get a couple of those mares." Petitioner told Hollenbeck to go to the Lincoln Fields Race Track and meet him at the paddock (R. 11). Before he went there Narcotic Agent Belcove talked with Hollenbeck and it was decided to go to the race track so that Hollenbeck might talk to petitioner. Agent Belcove then supplied Hollenbeck with $180 with which to buy morphine from petitioner. Three narcotic agents then drove Hollenbeck to the race track. Hollenbeck met petitioner, who told him he had sent in an order for the morphine and that it would take a day or so before he would get it. Hollenbeck then reported to the agents (R. 11), and Belcove arranged with Hollenbeck that he should return to Chicago when petitioner should notify him that the morphine had been received by petitioner (R. 8).

(May 28, 1942) Hollenbeck saw petitioner at the race track, where he was taken by the narcotic agents, and arrangements were made to meet there again June 2, at which time petitioner thought the morphine would be in. Hollenbeck reported this to the agents (R. 11).

(June 2, 1942) Hollenbeck telegraphed petitioner that he (Hollenbeck) would meet petitioner on June 3 at the race track (R. 11).

(June 3, 1942) by appointment the agents met Hollenbeck at the Narcotic Office (R. 8), and he reported to them. Hollenbeck was supplied with $180 by Belcove to pay for morphine. He was then taken to the race track by three agents, where he met petitioner. Petitioner said the morphine had not come in yet, and that he would like some money in advance. Hollenbeck then returned to the agents, who were keeping the meeting under surveillance, and told them what petitioner had said, and Agent Belcove handed Hollenbeck $20 with instructions to give it to petitioner as an advance (R. 8). Hollenbeck then went back to petitioner and handed him the $20, and petitioner said he would telephone Hollenbeck when the morphine came in (R. 12). Hollenbeck then left and rejoined the agents (R. 8).

(June 16, 1942) Hollenbeck talked to petitioner by telephone and asked petitioner when he (Hollenbeck) could expect the morphine he had ordered, and petitioner said he had not received it, but would call Hollenbeck as soon as it came in (R. 12).

(June 25, 1942) Hollenbeck heard from petitioner, who said he had the morphine and could deliver it the next day on his way to Springfield (Hollenbeck lived in Streator (R. 10)). Hollenbeck replied he could not accept the delivery because he had to get the money from his customer in Chicago, but that he could meet petitioner June 30 at the Arlington Park Race Track, and petitioner said he would have the morphine (R. 12).

(June 30, 1942) Hollenbeck came to the Narcotic Office and reported to the agents. He was given $160 of identified money and was taken by the agents to the race track. Hollenbeck told petitioner that he was in a hurry because he had to deliver the morphine to his customer and asked

petitioner to get it for him as soon as possible. Hollenbeck gave petitioner $100. Petitioner then went out into the parking lot, returned in a few minutes, and gave Hollenbeck the morphine. Before they parted Hollenbeck said he wanted another ounce of morphine, and petitioner said he would get it in about three weeks. Hollenbeck then rejoined the agents and delivered the morphine to them (R. 13).

(August 4, 1942) Hollenbeck telephoned petitioner and asked him if he had anything, and Hollenbeck ordered an ounce of morphine (R. 13).

(August 5, 1942) Petitioner telephoned Hollenbeck and said he wanted Hollenbeck to come to Chicago, as he had the stuff ready, and arrangements were made to meet on August 10 (R. 13).

(August 8, 1942) Hollenbeck telegraphed petitioner that he (Hollenbeck) would see petitioner at the Washington Park Race Track (R. 13).

(August 10, 1942) Hollenbeck came to Chicago and went to the Narcotic Office where he met the agents and reported to them the arrangements he had made with petitioner. The agents then drove Hollenbeck to the race track, and supplied him with $120 of identified money to purchase the ounce of morphine from petitioner. Hollenbeck and petitioner met under the surveillance of the agents. Petitioner left Hollenbeck after 30 or 35 minutes, after telling Hollenbeck he had the morphine in his car and that he would deliver it when he came back. Hollenbeck then rejoined the agents. An hour and a quarter later petitioner came back, delivered about an ounce of morphine to Hollenbeck, and received $120 from Hollenbeck who said he would like to get another ounce, and petitioner said "Call me back in about three weeks." They separated, and Hollenbeck went back to the agents and handed them the morphine (R. 13-14).

The foregoing facts (with the exception of the conversations, which were apparently out of hearing range) were corroborated by the three agents, who observed the meetings of Hollenbeck and petitioner.

Respondent then rested its case, and petitioner moved "the court to instruct the jury to return a verdict of not guilty." The motion was overruled and exception taken (R. 21).

Petitioner then denied making the sales, and fixed his whereabouts at a place where it would have been impossible for him to have made the sales (R. 28-29). French (R. 23) and Krasal (R. 26) corroborated the alibi. Goldstein (R. 22), Van Goldman (R. 22), Schmidt (R. 22), French (R. 24), Alford (R. 24), Cleary (R. 25), Severson (R. 25) and Newport (R. 26), testified petitioner's reputation as a law abiding citizen was very good. Despite the defense of alibi, respondent did not offer the identified money in evidence.

At the close of all the testimony, petitioner renewed his motion for a directed verdict in the same words. The motion was denied and exception taken (R. 41).

Motions for a new trial (R. 80) and in arrest of judgment (R. 80) were made, denied, and exceptions preserved.

After judgment and sentence, petitioner filed his notice of appeal to the Circuit Court of Appeals, setting forth as his grounds, among others, (1) that the court erred in failing to direct a verdict of not guilty at the close of all the evidence; and (2) that the evidence affirmatively showed that petitioner was entrapped into committing the alleged offense (R. 81-82).

Petitioner's assignment of errors specified the failure of the trial court to direct a verdict of not guilty (R. 83), and charged that the verdict was based upon evidence which affirmatively showed that petitioner was en-

trapped by respondent to commit the supposed crimes (R. 85).

On appeal to the Circuit Court of Appeals, petitioner urged that the evidence was insufficient to support the verdict because it established entrapment. Respondent maintained that this defense could not be considered by the appellate court because the record did not show it was before the trial court. Petitioner contended that his motions for a directed verdict tested the sufficiency of the evidence, and that the appellate court had the right to and should consider the facts on the merits and ascertain whether the facts were sufficient to support the verdict. However, the Court of Appeals decided that a *general* motion for a directed verdict, *stating no grounds*, is insufficient, and refused to consider the case upon its merits.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that a general motion for a directed verdict, stating no grounds, is insufficient to permit an appellate court to consider whether there is evidence to support a conviction.

2. In failing to hold that the motion for a directed verdict should have been granted.

V.

Summary of Argument.

A.

A general motion for a directed verdict in a criminal case, specifying no grounds, is sufficient to permit an appellate court to consider whether there is evidence to support a conviction.

Wiborg v. *United States*, 163 U. S. 632.
Crawford v. *United States*, 212 U. S. 183.

United States v. *Tennessee & Coosa R. Co.*, 176 U. S. 242.
Balaklala Consol. Copper Co. v. *Reardon*, 220 Fed. 298.
McDowell v. *United States*, 257 Fed. 298.
Mansfield v. *Horton*, 32 Fed. (2d) 851.
Ayers v. *United States*, 58 Fed. (2d) 607.
Van Gorder v. *United States*, 21 Fed. (2d) 939.
Baltimore & O. R. Co. v. *McCune*, 174 Fed. 991.
Reynolds v. *United States*, 47 Fed. (2d) 762.
Bogileno v. *United States*, 38 Fed. (2d) 584.

B.

The motion for a directed verdict should have been sustained, because the facts constitute entrapment and estop prosecution.

Sorrells v. *United States*, 287 U. S. 435.
O'Brien v. *United States*, 51 Fed. (2d) 674.
Morei v. *United States*, 127 Fed. (2d) 827.
Butts v. *United States*, 273 Fed. 35.
Voves v. *United States*, 249 Fed. 191.
Woo Wai v. *United States*, 223 Fed. 412.
United States v. *Certain Quantities of Intoxicating Liquors*, 290 Fed. 824.
United States v. *Echols*, 253 Fed. 862.
Driskill v. *United States*, 24 Fed. (2d) 525.
Peterson v. *United States*, 255 Fed. 433.
Cermak v. *United States*, 4 Fed. (2d) 99.
Cline v. *United States*, 20 Fed. (2d) 217.
Hunter v. *United States*, 62 Fed. (2d) 217.
Strader v. *United States*, 72 Fed. (2d) 589.
18 A. L. R. 146.

ARGUMENT.

A.

A general motion for a directed verdict in a criminal case, specifying no grounds, is sufficient to permit an appellate court to consider whether there is evidence to support a conviction.

In *Wiborg* v. *United States*, 163 U. S. 632, a criminal case, this court said at p. 658:

> "Where an exception to a denial of such a motion or request (for directed verdict) is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict."

Although the motion was *not* made in that case, yet, the court said, if a plain error was committed in a matter so absolutely vital to defendant, the court felt themselves at liberty to correct it.

The decision just cited was followed in another criminal case, *Crawford* v. *United States*, 212 U. S. 183, where this court held at p. 194:

> "In criminal cases courts are not inclined to be as exacting, with reference to the specific character of the objection made, as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception. *Wiborg* v. *United States*, 163 U. S. 632, 659."

The same reasoning was also advanced by this court in a civil case, *United States* v. *Tennessee & Coosa R. Co.*, 176 U. S. 242, 256.

Petitioner submits the decision of the Circuit Court of Appeals is not in accord with *Wiborg* v. *United States,* 163 U. S. 632, and *Crawford* v. *United States,* 212 U. S. 183.

The Circuit Court of Appeals for the Ninth Circuit, in a *civil* case, *Balaklala Consol. Copper Co.* v. *Reardon,* 220 Fed. 584, held sufficient a general motion of defendant for a directed verdict, specifying no grounds. The court at p. 589 cited the conflict in decisions between the Ninth and Seventh Circuits, but held it was disposed to hold that the general motion was sufficient.

The Circuit Court of Appeals for the Eighth Circuit, in a criminal case, *McDowell* v. *United States,* 257 Fed. 298, held sufficient a general motion for a directed verdict. The court said at p. 298:

> "Our practice has been to regard a general motion or request for a directed verdict as challenging the legal sufficiency of the evidence for a contrary conclusion, and we are constantly applying it. It is in harmony with the practice in the Sixth circuit (*Louisville & N. R. Co.* v. *Womack,* 97 C. C. A. 559, 566, 183 Fed. 752, 759), though not with that in the Seventh Circuit (*Adams* v. *Shirk,* 43 C. C. A. 407, 104 Fed. 54)."

Ten years later the same court, in a civil case, *Mansfield Hardwood Lumber Co.* v. *Horton,* 32 Fed. (2d) 851, stated at p. 853 that it had concluded to adhere to a long line of decisions announced in that circuit holding a general motion insufficient, and to hold that the rule stated in the *McDowell case* is no longer the law in that circuit. The court did state, however, at p. 853, in discussing the conflict in its own circuit, that the decision in the *McDowell case* "might well have been placed upon the ground that in a criminal case the appellate court

may of its own volition notice a plain error, although no motion, ruling, and exception were had relative thereto."

Three years later the Circuit Court of Appeals for the Eighth Circuit, in a criminal case, *Ayers* v. *United States*, 58 Fed. (2d) 607, while still apparently holding to its views in the *Mansfield Lumber case*, said at p. 609:

> "Notwithstanding this rule, this court, in order to prevent an injustice, may notice a plain error even in a civil case. (Citing cases.) In criminal cases, in order to prevent a miscarriage of justice, a wider discretion to review errors not properly saved or presented for review is recognized."

The court then cited *Wiborg* v. *United States*, 163 U. S. 632, 658, and *Crawford* v. *United States*, 212 U. S. 183, 194, previously referred to, and disposed of the government's contention that the general motion for a directed verdict was insufficient, holding that even in the absence of a sufficiently particularized motion the court has discretion to set a conviction aside if there is no substantial evidence to sustain the verdict, not because of any duty it owes the defendant, but solely in the public interest and to prevent injustice.

In *Van Gorder* v. *United States*, 21 Fed. (2d) 939, a criminal case, before the Circuit Court of Appeals for the Eighth Circuit, the government objected to consideration of the case by the court because defendant had made *no* motion for a directed verdict (the contention being very similar to the holding of the Court of Appeals in the instant case). The court, in reversing the conviction, said at p. 942:

> "But since the decision of the Supreme Court in *Wiborg* v. *U. S.*, 163 U. S. 632, 659, 16 S. Ct. 1127, 1197, 41 L. Ed. 289, there has been and still exists an alleviation in the interest of justice of the strict

rule and practice that no relief whatever may be granted by the federal appellate courts, except on recorded objections or exceptions to rulings in the trial courts, to the effect that in criminal cases involving the life or liberty of the accused the appellate courts of the United States may notice and correct, in the interest of a just and fair enforcement of the laws, serious errors in the trial of the accused fatal to the defendant's rights, although those errors were not challenged or reserved by objections, motions, exceptions, or assignments of error."

See also the liberal rule stated by the Circuit Court of Appeals for the Third Circuit in a *civil* case, *Baltimore & O. R. Co.* v. *McCune*, 174 Fed. 991, 992.

The decisions of the Circuit Court of Appeals for the Tenth Circuit are also in accord with *Wiborg* v. *United States*, 163 U. S. 632, and *Crawford* v. *United States*, 212 U. S. 183; *Reynolds* v. *United States*, 48 Fed. (2d) 762, 763; *Bogileno* v. *United States*, 38 Fed. (2d) 584, 587.

Petitioner submits the decision of the Circuit Court of Appeals for the Seventh Circuit in the case at bar is in conflict with the decisions of the other Circuit Courts of Appeals, *supra*, and this conflict should be resolved.

B.

The motion for a directed verdict should have been sustained, because the facts constitute entrapment and estop prosecution.

It is clearly the law that when the criminal design originates with the officials of the government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute, no conviction can be had. *Sorrells* v. *United States*, 287 U. S. 435, 442; *O'Brien*

v. *United States,* 51 Fed. (2d) 674, 679; *Morei* v. *United States,* 127 Fed. (2d) 827, 833.

The facts in this case show conclusively that the criminal design did not originate with petitioner. The decoy telephoned petitioner on May 27, 1942, and said, "I would like to get a couple of those mares." Petitioner did not seek out the decoy. On that day Belcove supplied the decoy with $180 for the avowed purpose of buying morphine from petitioner. They met at the race track, but no sale was effected. They met again the following day, May 28, again under the surveillance of the government agents, but no sale was effected. They met again on June 3, again under governmental surveillance, but still no sale was effected. They met again on June 30, and then, thirty-four days after the government agents and their decoy first started working on the petitioner, a sale was effected. At that time the decoy asked for another ounce. Thereafter the decoy communicated with petitioner on August 4 and August 8 before the second sale was effected on August 10, forty-one days after the second order.

Previous to these sales petitioner, as disclosed by the evidence of eight character witnesses, enjoyed a good reputation. No effort was made to challenge or rebut the testimony of his good character. There was no evidence that he had ever been engaged in the narcotic traffic or any other criminal transactions; and there was no evidence of any reasonable cause to believe that he was engaged in the narcotic traffic.

We urge that it is conclusive from these facts that the criminal design originated with the entrappers, and not with the accused, who previously admittedly enjoyed a good reputation.

In order to warrant a conviction in a case where the facts would otherwise constitute entrapment, there must be present: (1) Reasonable suspicion on the part of the

officers that the party is engaged in the commission of a crime, or is about to do so; or (2) the original suggestion or initiative must have come from the perpetrator. *Morei* v. *United States*, 127 Fed. (2d) 827, 833; *United States* v. *Certain Quantities of Intoxicating Liquors*, 290 Fed. 824, 826.

Neither of these two elements is present in the case at bar. Petitioner challenges respondent to point out any evidence in the record that the narcotic agents had reasonable suspicion that petitioner was engaged in the commission of a crime or was about to commit one on May 27, 1942. The evidence is to the contrary. Petitioner was at home that day, peacefully and law-abidingly engaged in the practice of his profession. There is no evidence that petitioner, having been in that profession forty years, had ever contemplated, much less intended to violate the narcotic laws. He had never done so (R. 30). Eight witnesses testified to the good reputation of petitioner as a law abiding citizen, and this evidence was not challenged or rebutted by respondent.

Petitioner further challenges respondent to point out any evidence in the record of the second essential element to overcome entrapment, namely that the original suggestion or initiative must have come from petitioner. The evidence is to the contrary. Hollenbeck initiated the plot when he telephoned petitioner on May 27, 1942, and respondent's narcotic agents and their decoys then lured and incited petitioner into wrongdoing, which would otherwise never have been committed.

The rule has been laid down that where the officers of the law have incited a person to commit the crime charged, and lured him on to its consummation with the purpose of arresting him in its commission, the law will not authorize a verdict of guilty. *Peterson* v. *United States*, 255 Fed. 433; *Woo Wai* v. *United States*, 223 Fed. 412.

Many decisions have recognized the principle announced by Mr. Justice Roberts in his separate opinion in *Sorrells* v. *United States,* 287 U. S. 435, in which he was joined by Mr. Justice Stone and Mr. Justice Brandeis. The rule was there stated:

> "Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty. If in doubt as to the facts it may submit the issue of entrapment to a jury for advice. But whatever may be the finding upon such submission the power and duty to act remain with the court and not with the jury."

Other decisions following this rule are: *O'Brien* v. *United States,* 51 Fed. (2d) 674 (holding motion for directed verdict should have been granted); *Morei* v. *United States,* 127 Fed. (2d) 827 (holding motion for directed verdict should have been granted); *Butts* v. *United States,* 273 Fed. 35 (holding entrapment entitles accused to verdict of not guilty, and citing numerous cases); *Voves* v. *United States,* 249 Fed. 191 (holding entrapment estops prosecution); *Woo Wai* v. *United States,* 223 Fed. 412 (holding entrapment estops prosecution); *United States* v. *Echols,* 253 Fed. 862 (to same effect); *Peterson* v. *United States,* 255 Fed. 433 (holding that where entrapment is present, law will not authorize verdict of guilty, and citing cases); *Cermak* v. *United States,* 4 Fed. (2d) 99 (prosecution precluded); *Cline* v. *United States,* 20 Fed. (2d) 494 (holding error in refusing to direct verdict of not guilty, or else in not setting aside verdict of guilty).

Petitioner believes it unnecessary to observe the various shades of opinion upon the subject of entrapment. Each case must be governed to a large extent by its own facts. In this case, the evidence disclosed that petitioner had a

good reputation. No effort was made to challenge and rebut the testimony of his good character. He has been a licensed veterinarian for forty years. There was no evidence that he had ever been engaged in the narcotic traffic or any other criminal transactions; and there was no reasonable cause to believe that he was engaged in the narcotic traffic. We believe an examination of the evidence will impel the conclusion that the criminal design originated with the agents of the government, and that they, through their decoy, implanted in the mind of petitioner the disposition, never before there, to commit the offense.

CONCLUSION.

In conclusion, it is submitted that petitioner is entitled to an appellate review of his case upon the merits, and that upon such review respondent should be held estopped and the judgment reversed.

Respectfully submitted,

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